STATE OF MICHIGAN

COURT OF APPEALS

WELCH'S STEAK & RIBS, INC, Plaintiff-Appellee,	UNPUBLISHED May 22, 2014
v	No. 310697 St. Joseph Circuit Court
NORTH POINTE INSURANCE COMPANY, Defendant-Appellant.	LC No. 09-1019-CK

Before: SAWYER, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting plaintiff's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for a New Trial. We affirm in part, and reverse in part.

I. BACKGROUND

This case concerns a fire that occurred at Welch's Steak & Ribs in 2009. The owners of the restaurant, Robert and Laurie Rastovski, filed suit against defendant North Pointe after their insurance claim was denied. North Pointe defended that the fire was the result of an arson in which Mr. Rastovski was involved.

Prior to suit the Rastovskis retained Howard Mishne of Globe Midwest Insurance to help them prepare a "proof of loss" to submit with their claim for coverage to North Pointe. The Rastovskis were also in contact with North Pointe's claims adjuster Lester "Bud" O'Brien. The signed proof of loss was submitted on July 29, 2009. The Rastovskis received a denial letter from North Pointe in November 2009. The letter read

> "after a careful review of the information you provided, your sworn testimony and other matters obtained during this independent investigation, North Pointe has determined that you have made knowingly false statements concerning material matters. These false statements include, but are not limited to, false statements relative to your conduct prior to the fire … additionally there is circumstantial evidence linking you to the incendiary fire as well as the evidence of opportunity and motive for destroying the property."

On November 16, 2009, the Rastovskis filed suit. A jury trial began on January 25, 2012. At trial Detective Lonnie Palmer testified the fire was determined to be arson and that Dustin Gonser, who admitted to committing the arson with the assistance of fugitive Nathan Lumbard, had already been prosecuted. Lumbard agreed to be interviewed before absconding. During his interview Lumbard stated that he was approached by Mr. Rastovski to burn down the restaurant and that Mr. Rastovski and Gonser had conspired to do the arson together. Gonser was transported from the Michigan Department of Corrections to testify. He confirmed that he was then incarcerated for the arson of Welch's Steak & Ribs and for breaking and entering into the same. However, Gonser repeatedly denied any interaction with Mr. Rastovski. He further denied allegations that Mr. Rastovski paid him to burn down the restaurant. At trial Mr. Rastovski admitted to knowing Lumbard as an owner of a nearby bar. He also acknowledged that he spoke to Lumbard briefly regarding the state of the restaurant's liquor license; however, Mr. Rastovski adamantly denied having solicited Lumbard to burn down the restaurant.

Gary Nayh testified for defendant as a certified public accountant. He stated that in 2007 the restaurant lost $42,000; in 2008 it lost $108,000 and for the first five months in 2009 it lost $16,000. Outside of the jury's presence, the trial judge expressed concern that the jury would be confused by "a lot of accounting testimony that's not relevant to any issue in the case." He added that the jury should know that Nayh's testimony was being offered for the limited purpose of proposing a motive for Mr. Rastovski to burn down his own building, otherwise it just "muddies the water for them."

Plaintiff presented its claim adjuster, Mishne, to testify regarding the process through which he and his team prepared the proof of loss. Mishne testified to how he and his team entered the restaurant site to do a walk-through, take pictures and notes, and identify building contents. They consulted Mr. Rastovski and his general manager as well as vendors and restaurant staff for items in the restaurant that were not readily identifiable. Mishne testified to later returning to the site with his team to take measurements and photos in order to determine a final price for the building repair. According to Mishne, they "literally pick[ed] through the debris and identif[ied] every single possible item that they [could that was] in the building" and inventoried it. The inventoried list was taken back to their office where it was used to create excel spreadsheets on which items were given a value based upon client invoices, catalogs or internet searches. On or around July 10, 2009, Mishne and Greer met the North Pointe adjuster O'Brien at the restaurant site to go over the building and contents estimates. According to Mishne, O'Brien took issue with very few items on the claim where he could not verify the size or quality of something. Mishne later requested an advance on the claim and O'Brien denied the claim because of the arson investigation.

Mishne testified that he presented North Pointe with losses calculated at $1,118,640.06. The actual amount claimed on behalf of the plaintiffs under the policy of insurance, however, was $638,977.17 because that was the amount of coverage allowed under plaintiff's insurance policy. He calculated the building's actual cash value to be $612,000 and the personal property claim amount to be $341,121.78 with a depreciated actual cash value of $281,261.66. Mishne pointed out that he never received a single document from North Pointe and found it unusual that North Pointe did not assign its own expert to counter the claim.

O'Brien testified that the Rastovskis purposefully inflated their estimates. First he indicated that the Rastovskis requested $295,000 for the building, including the land when they were previously appraised by the county for $140,000 and by an independent appraiser for $143,500. Second, O'Brien asserted that the Rastovskis claimed the business personal property of the restaurant amounted to $281,261, but his review concluded that the liquor and food had a value of no more than $30,000; the value of equipment was $45,000 and that the financial records supported a replacement of other property to be $145,000. All together, O'Brien's calculation for business personal property was only $220,000. Because his total was over $60,000 less than the amount claimed by the Rastovskis, O'Brien believed the Rastovskis' claim amount to be another example of deceptive inflation. O'Brien testified that he additionally supported denying the Rastovskis' claim because of information he received during his investigation from "police officials, cause and origin investigation, sworn statements under oath, sworn proof of loss statements, [and] accounting information" that supported a conclusion that the plaintiffs were involved in the arson that caused the damage.

On February 3, 2012, the jury delivered its verdict to the court. It found that plaintiff suffered a loss which was covered under an insurance policy issued by defendant, that the fire was not caused by or resulted from the dishonest or criminal acts of plaintiff or its representatives, but that plaintiff or its officers engaged in fraud or intentionally concealed or misrepresented a material fact concerning the insurance claim.

Plaintiff filed its motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for a New Trial. The trial judge granted plaintiff's Motion for Judgment Notwithstanding the Verdict and conditionally granted its Motion for a New Trial. The trial judge thought the jury was confused by "accusations of acts of lying, of misstatements being made, [and] of bad acts being done" to the point where it could not carry out its duty to differentiate between a material misrepresentation made in the claim process from the many other misrepresentations that were alleged against plaintiff. He also indicated that Mishne prepared a thorough report and O'Brien, who never submitted anything in contradiction, could not merely claim that fraud existed because he disagreed with Mishne's values.

The trial judge ultimately decided the jury verdict was against the great weight of the evidence and that the court therefore, had an obligation to direct the verdict. He further determined that the jury received an instruction that was a mistake of law and fact. The trial judge granted plaintiff judgment in "the amount of $450,000 for the actual cash value of the building, and $175,000 for the business personal property value of the building."

II. JUDGMENT NOTWITHSTANDING THE VERDICT

Defendant argues that it was improper for the trial judge to direct the verdict in plaintiff's favor when there was sufficient evidence to support the jury's verdict and the question of plaintiff's intent to defraud was one for the jury to decide. We agree.

A circuit court's decision on a motion for judgment notwithstanding the verdict (JNOV) is reviewed de novo. *Prime Financial Serv LLC v Vinton*, 279 Mich App 245, 255; 761 NW2d

694 (2008). JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury. *Sniecinski v Blue Cross and Blue Shield of MI*, 469 Mich 124, 131; 666 NW2d 186 (2003); *Heaton v Benton Constr Co*, 286 Mich App 528, 532; 780 NW2d 618 (2009). The jury verdict must stand if reasonable jurors could have honestly reached different conclusions. *Genna v Jackson*, 286 Mich App 413, 417; 781 NW2d 124 (2009).

Under MCR 2.610(B), "[i]f a verdict is returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of the judgment as requested in the motion." In the instant case, after the jury returned a verdict for defendant, the trial court directed the entry of judgment in favor of plaintiff.

In Michigan all fire insurance policies must contain language that "the policy may be void on the basis of misrepresentation, fraud, or concealment." MCL 500.2833(1)(c). Plaintiff's commercial insurance policy from defendant provided that coverage would be void in the event plaintiff "intentionally conceal or misrepresent a material fact concerning: . . . d. A claim under this insurance." Defendant claimed an intentional concealment or misrepresentation occurred and that the event represented a fraud on the part of plaintiff's owners abrogating defendant's responsibility to provide coverage and defending it against actions like the one before us.

This Court, in *Mina v Gen Star Indemnity Co*, 218 Mich App 678, 686; 555 NW2d 1 (1996) rev'd in part on other grounds 455 Mich 866 (1997), explained the defense of fraud or false swearing:

> The insurer's defense of "false swearing" is an allegation that the insured submitted fraudulent proof of loss. Fraud or false swearing implies something more than mistake of fact or honest misstatements on the part of the insured. It may consist of knowingly and intentionally stating upon oath what is not true, or stating a fact to be true although the declarant does not know if it is true and has no grounds to believe that it is true. In order to prevail, the insurer must prove not only that the swearing was false, but also that it was done knowingly, willfully, and with intent to defraud. Fraud cannot be established from the mere fact that the loss was less than was claimed in the preliminary proofs furnished to the insurer. [Citations omitted.]

It further stated the required elements for establishing the defense:

> To void a policy because the insured has willfully misrepresented a material fact, an insurer must show that (1) the misrepresentation was material, (2) that it was false, (3) that the insured knew that it was false at the time it was made or that it was made recklessly, without any knowledge of its truth, and (4) that the insured made the material misrepresentation with the intention that the insurer would act upon it. A statement is material if it is reasonably relevant to the insurer's investigation of a claim. *Id*. at 686 [Citations omitted.]

"Where an insurance policy provides that an insured's concealment, misrepresentation, fraud, or false swearing voids the policy, the insured must have actually intended to defraud the insurer." *West v Farm Bureau Mut Ins Co of Michigan*, 402 Mich 67, 69; 259 NW2d 556 (1977) (citations omitted). "It is well settled that, if no fraud was intended by the insured, the policy will not be invalidated on that ground." *Tubbs v Dwelling-House Ins Co*, 84 Mich 646, 654; 48 NW 296, 298 (1891) (citation omitted). In the instant case, there was no evidence plaintiff intended to conceal or misrepresent a material fact in the claim process in regard to the information it provided about the personal and business property contents of the restaurant. Defendant has not disputed the existence of the inventory, but rather holds his contentions with the purported value of the land and the building. In support of its claim that submission of these higher values is evidence of material misrepresentation the defendant offered evidence of the plaintiff's earlier assertion of the value of the restaurant building, its contents, its liquor license, and its land. Defendant also noted the accountant's ongoing depreciation of equipment since 1992, a lack of record of new purchases by the Rastovskis to substantiate the increased value claimed, and Mishne's use of 20% depreciation on all items regardless of age or useful life.

Fraudulent intent may be inferred from an extreme disparity between the proof of loss and the actual loss. *Rayis v Shelby Mutual Ins Co*, 80 Mich App 387; 264 NW2d 5 (1978). Defendant first argued that a local bank had appraised the property for $340,000 two years earlier in 2007 and that around the same time Mr. Rastovski attempted to sell the restaurant to chef Flowers for $595,000. Defendant further pointed out that in October 2008 the Rastovskis listed the building and land for $295,000 or $425,000 for the building, land and liquor license. Also, that the county assessed the property for $140,752 in the beginning of 2009 and defendant had an independent appraisal company appraise the property in 2010 similarly for $142,300.

It is noteworthy that the evidence in this trial came in largely without objection and that no Motions in Limine were heard before or during the trial. While vigorous argument can be made that plaintiff's claim was based upon recent market data and the other valuations were stale or otherwise less than credible, the sole question for this Court is whether there was competent admissible evidence upon which a jury could conclude that the claim was so inflated as to support fraud. The proofs presented by the defense in the light most favorable to them, show a five hundred percent inflation factor which is sufficient to support the jury's finding. The misrepresentation was material to the claim under insurance and it was for the jury to determine whether the disparity established its falsity. Therefore, we conclude that the trial court did err in granting judgment notwithstanding the verdict in favor of plaintiff.

III. ALTERNATIVE MOTION FOR A NEW TRIAL

Defendant asserts that the trial court abused its discretion when it conditionally granted plaintiff a new trial. More clearly, that the trial court improperly interpreted evidence presented by the defense in support of its affirmative defenses as irrelevant, that the court failed to specify its grounds for granting a new trial as required by MCR 2.611(A)(1)(e) and that the court incorrectly identified a mistake in its instructions to the jury. We disagree.

A trial court's decision to grant or deny a motion for a new trial under MCR 2.611 is reviewed for an abuse of discretion. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685

NW2d 391 (2004). A trial court abuses its discretion when its decision falls outside of the range of reasonable and principled outcomes. *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006). "Our review of the trial court's order granting a new trial is extremely limited." *Petraszewsky v Keeth*, 201 Mich App 535, 539; 506 NW2d 890, 892 (1993). "[T]he granting or denial of a motion for a new trial rests largely within the discretion of the trial court, which, if not abused, cannot be interfered with on appeal." *Benmark v Steffen*, 9 Mich App 416, 420, 157 NW2d 468, 471 (1968). "Even greater latitude is allowed the trial court in granting than in refusing new trials, and the appellate court will interfere more reluctantly where the new trial is granted than where it is denied, since in such cases the rights of the parties are not finally settled as they are where the new trial is refused." *Id*. at 420 (citations omitted).

The trial judge stated he conditionally ruled on plaintiff's Motion for a New Trial under MCR 2.610(C) in the event of being reversed on appeal. As required, he specified which grounds listed in MCR 2.611 supported granting a new trial. MCR 2.610(C)(1). He specifically cited grounds (A)(1)(a), (A)(1)(e) and (A)(1)(g).

A. MCR 2.611(A)(1)(a)

MCR 2.611(A)(1)(a) states that a new trial can be granted when there was an "[i]rregularity in the proceedings of the court, jury, or prevailing party, or an order of the court or abuse of discretion which denied the moving party a fair trial." Defendant argues that there was no evidence of an irregularity in the proceedings of the court and if there was, the court failed to articulate how plaintiff was denied a fair trial by the irregularity. We disagree.

The trial court determined "[t]he introduction of so much evidence that was not relevant to the claim at hand, although done by both sides, led to the confusion of the jury, thereby leaving an irregularity in the proceedings of the Court." The court was specifically concerned with testimony regarding Lumbard and Gonser. The court understood that one of defendant's affirmative defenses was that Mr. Rastovski participated in the arson of his own restaurant. Lumbard's deposition testimony regarding having been approached and solicited by Mr. Rastovski "to get rid of a building" was probative of this defense theory. Gonser's testimony was probative to plaintiff's theory that Gosner and Lumbard committed the arson without contact or solicitation by Mr. Rastovski. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Lumbard's and Gonser's testimony was relevant; however, the jury listened to Lumbard's entire deposition. The deposition contained a plethora of irrelevant information which would not have been admissible had any objection been made. It discussed Lumbard's business, his criminal history, his relationship with Gonser and other people, the details of an earlier burglary at the restaurant, hearsay from Gonser and city police officers, and other occurrences of fire and theft in and around the area where the restaurant was located.

During closing statements neither counsel proposed that certain evidence should be accepted only for a limited purpose. The court also did not give a limiting instruction regarding Lumbard's deposition testimony read to the jury. It only stated that the jury was to give this

evidence the same consideration as it would have given had the witness testified in court. Later, during its deliberations, the jury actually requested and received the deposition transcript.

The jury delivered a verdict in support of one of defendant's affirmative defenses. But when plaintiff's Motion for a New Trial was submitted, the trial judge took the opportunity to rectify the irrelevant evidence issues which he held affected the proceedings in such a way as to cause an irregularity. It is a duty of the trial court to correct errors when it has the opportunity to do so by ruling on a motion for a new trial. *Termaat v Bohn Aluminum & Brass Co*, 362 Mich 598, 602; 107 NW2d 783 (1961). The judge explained that the court was not substituting its judgment for that of the jury, but was instead granting a new trial on demonstrable errors that occurred during the trial. *Humphrey v Bay Refining Co*, 16 Mich App 394, 397-398; 168 NW2d 314 (1969).

A review of the trial record supports the trial court's decision to grant a new trial under MCR 2.611(A)(1)(a). The instances of irrelevant and extremely prejudicial evidence admitted at trial support the court's determination that an irregularity occurred such that the conditional grant of a new trial did not fall outside the range of reasonable outcomes expected. We therefore find that the trial court did not abuse its discretion in conditionally granting a new trial under MCR 2.611(A)(1)(a).

Defendant is correct in noting that the trial court did not state its reasons on the record as to how the irregularity in the court proceedings denied plaintiff a fair trial. This error was harmless when the trial court also had grounds, as we discuss below, to grant a new trial under MCR 2.611(A)(1)(g).

B. MCR 2.611(A)(1)(e)

Defendant contends that the trial court abused its discretion when it conditionally granted a new trial to plaintiff under (A)(1)(e) because the court improperly weighed the evidence and usurped the role of evaluating witnesses from the jury. We agree. MCR 2.611(A)(1)(e) reads that a new trial can be granted when "[a] verdict or decision was against the great weight of the evidence or contrary to the law." "Where there is competent evidence to support the finding of the jury its verdict should not be set aside and a new trial granted solely because the trial judge would weigh and evaluate the evidence differently." *Board of County Road Com'rs of Kalamazoo County v Bera*, 373 Mich 310, 314; 129 NW2d 427, 429 (1964). Given our analysis of the grant of judgment notwithstanding the verdict it is clear that had this been the sole basis for a new trial it would have been error.

C. MCR 2.611(A)(1)(g)

Defendant lastly asserts that the trial court abused its discretion when it conditionally granted a new trial to plaintiff under (A)(1)(g) because the jury was not confused by the court's instructions and the instructions did not contain errors of law. We disagree. According to MCR 2.611(A)(1)(g) a new trial can be granted when there was an "[e]rror of law occurring in the proceedings, or mistake of fact by the court." The trial court reasoned that a new trial should be granted under this subsection because the court gave an instruction to the jury that caused

confusion, and it therefore, must not have been a clear statement as to what the law was. The relevant portion of the court's instruction to the jury was

> Pursuant to the insurance policy, North Pointe Insurance Company is also not required to pay for the loss or damage if Welch's Steak and Ribs or any of its officers engaged in fraud or intentionally concealed or misrepresented a material fact concerning the insurance claim. North Pointe Insurance Company claims the Plaintiff engaged in fraud or intentionally concealed or misrepresented a material fact concerning Welch's Steak and Ribs' fire loss insurance claim by claiming more than the actual cash value of the property.

Neither side objected to this instruction in either form or substance. The actual question on the verdict form was, "Did Welch's Steak & Ribs, or any of its officers, engage in fraud or intentionally conceal or misrepresent a material fact concerning the insurance claim?" During deliberations the jury sent the following inquiry to the court: "The question is in the wording 'intentionally conceal or misrepresent' because of the word (or); is the word intentionally meant to be included with misrepresent or separately?" Out of the presence of the jury, the attorneys and the trial judge went directly to the contractual language of the insurance policy under the commercial property conditions of the contract and read,

> This coverage is void in any case of fraud by you as it relates to this coverage at any time. It is also void if you or any other insured at any time intentionally conceal or misrepresent a material fact concerning: This coverage part, the covered property, your interest in the property or a claim under the coverage part.

The trial court determined that conceal and misrepresent were set apart from the sentence involving fraud, such that conceal and misrepresent were meant to be read together. Further, that 'intentionally' applied to both conceal and misrepresent, and the insurance contract language should be understood as requiring both an intentional concealment and an intentional misrepresentation in order to void the insurance policy. The court also reasoned that intentional must apply to misrepresentation too because it could not fathom how an innocent misrepresentation could void the policy. After further deliberations, the jury returned a verdict in favor of defendant and found that plaintiff, or its officers, engaged in fraud or intentionally concealed or misrepresented a material fact concerning the insurance claim.

The court determined that juror confusion must have resulted from an error of law committed by the court or an error in the court's presentation of the jury instructions. Defendant asserts that because the jury instruction was modeled after Michigan law and with language taken directly from the insurance policy, no error of law occurred. We note, however, that the error of law claimed by the court was its own error in allowing irrelevant evidence to be heard by the jury and later failing to instruct more clearly that the law required the misrepresentation or concealment to be about a material fact *in the claim process*. It was not outside the principled range of outcomes for the trial court to recognize its error and use the mechanism of MCR 2.611(A)(1)(g) to correct it; therefore, the court did not abuse its discretion in conditionally granting a new trial to plaintiff under this subsection.

For the above reasons, we reverse the trial court's order granting plaintiff's Motion for Judgment Notwithstanding the Verdict, and affirm the Alternative, Motion for a New Trial. We do not retain jurisdiction. As the prevailing party, defendant may tax costs. MCR 7.219.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens